where a younger child, aged six years, picked it up and discharged it, inflicting a wound on one of the other boys from which he died. The plaintiff sued for loss of services, and expenses incurred in trying to save the wounded boy. The complaint was held good on demurrer, and the court held as a matter of law that the defendant was liable.

The conflict in these decisions, coupled with the fact that the prohibition of such sales by statute shows a realization that accidents are at least of possible occurrence, raises a doubt as to the wisdom of the court in the recent Illinois case and in the Iowa case in withdrawing the matter from the jury and deciding as a question of law that an accident is not the natural and probable consequence of such a sale. The very fact that there is a statute prohibiting such sales shows that in the judgment of those who made the statute such sales were so great a source of danger that the public welfare demanded their suppression; and the same question of public welfare would seem to sanction the courts in taking the position that a jury might find that the defendant should have reasonably foreseen such an accident, and the existence of such a statute seems sufficient to make the question one of fact for the jury.

MENTAL SUFFERING AS AN ELEMENT OF DAMAGE FOR BREACH OF CONTRACT.

In the recent case of *McConnell v. United States Express Co.*, decided by the Supreme Court of Michigan in March, 1914, the following facts were found:[1] The plaintiff, a middle-aged woman who was just recovering from a long sickness, had planned to join a party of Cook tourists in New York, and with them to make the trip to Naples, principally for the purpose of restoring her health. She went to the defendant's office in Pontiac, Michigan, and arranged with the defendant's agent, one Burgis, to have her trunk, which contained her entire wardrobe for the trip, transported to the pier in New York, in ample time to catch the boat. Burgis promised to have it there on time, and knew of the character of the trip, and that it was very important that it should arrive, but it did not appear that he knew of plaintiff's recent illness or her specific purpose in making the voyage, or those mental

[1] 146 N. W. 429.

and physical peculiarities, upon which considerable stress is laid in the opinion. The trunk did not arrive in time, and the plaintiff was found to have suffered considerable physical inconvenience on the voyage over, as well loss of pleasure and mental anxiety and annoyance, as a consequence. The trial court allowed the jury to award damages for this mental suffering, and on appeal its judgment was affirmed by an evenly divided court, four judges voting for affirmance, and four for reversal. The precise point of contention was as to whether or not such damages were in the contemplation of the parties at the time of making the contract, and the judges who voted for affirmance held that they were. In order to appreciate the significance of this holding, a somewhat extended review of the cases becomes necessary.

Any analysis of the elements of damage recoverable in actions for breach of contract must start with the case of *Hadley v. Baxendale,* which defined the damages to be "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it", and which has universally been recognized as laying down the proper rule.[2] Annoyance, vexation, and mental suffering, however, were at first, with only one exception, never held to have been in the contemplation of the parties. This exception was made in breach of promise cases, and the reason given was that such contracts dealt primarily with the feelings and sensibilities of the parties.[3] Then it began to be felt that certain other classes of contracts also dealt primarily with the feelings, or at least that this element was sufficiently prominent to justify the courts in holding that here, too, mental suffering was fairly within the contemplation of the parties. Chief among these were the so-called "social telegram" cases, where either the sender or sendee was suing *ex contractu* for breach of duty in failing to transmit a death message with sufficient promptness. It should be noted here that all the cases of this class which are quoted later were cases where the cause of action was treated by the court as contractual, although in some of them the sendee of the message was suing. One or two treated the sender as the agent of the sendee to deal with the company, while others seemed to regard the sendee as the real party in interest, or beneficial plaintiff. In

[2] 9 Exch. 341.

[3] *Coolidge v. Neat,* 129 Mass. 146.

all of them, however, the damages were assessed under the rule in *Hadley v. Baxendale.* The following are the principal American decisions which have extended the recovery of damages for mental suffering to contracts other than those of betrothal.

In the recent Alabama case of *Browning v. Fies,* the action was for breach of contract to provide a hack for the transportation of plaintiff and his family to the church where his bride was waiting.[4]

The Iowa case of *Mentzer v. Western Union Tel. Co.,* which was an action for failure to deliver a death message, although sounding in tort, indicated clearly, by way of dictum, that the result would have been the same had the action been contract.[5]

The Louisiana case of *Lewis v. Holmes* was an action for the breach of contract to furnish a trousseau for a bride.[6]

The New York case of *Aaron v. Ward* was an action of assumpsit, for revocation of a license to enter defendant's bathhouse and expulsion of plaintiff therefrom.[7]

The Tennessee case of *Wadsworth v. Telegraph Co.* was another of the actions for breach of contract to deliver a death message.[8]

The Texas case of *J. E. Dunn & Co. v. Smith* was an action for breach of contract to provide an adequate coffin for one of plaintiff's family.[9]

In all these, as well as in the principal case, the jury was allowed to consider the element of mental suffering in assessing damages. But if we compare the gist of the action in each of the above cases with that in the principal case, we shall see that every one of them except the New York decision of *Aaron v. Ward,* is far more intimately concerned with the feeling and sensibilities of the plaintiff, *prima facie* at least, than the delivery or non-delivery of a trunk. And it is with the *prima facie* aspect of the contract that we have to deal, in the absence of proof that the defendant in the principal case had notice of the plaintiff's convalescent condition, and her specific purpose in making the trip. Assuming that Burgis knew that her entire wardrobe for

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[4] 58 So. 931.
[5] 93 Ia. 752.
[6] 109 La. 1030.
[7] 253 N. Y. 351.
[8] 86 Tenn. 695.
[9] 74 S. W. 576.

the trip was contained in this trunk, and that its arrival was therefore of extreme importance, it is still safe to say that the plaintiff's feelings and sensibilities were not involved nearly so obviously here, as in any of the cases cited above. Certainly it cannot be said to have been a contract which dealt primarily with the emotions. But in other states there is an equally decided tendency not to extend the recovery of damages for mental suffering. It may be helpful to cite a few of these decisions.

The United States Circuit Court of Appeals case of *Wilcox v. Railroad Co.* was an action for the breach of contract to furnish plaintiff a special train, in order that he might reach a sick parent.[10]

The Missouri case of *Trigg v. Railroad Co.* was an action for the breach of contract in failing to allow plaintiff to alight at her station, and in carrying her by.[11]

The later Missouri case of *Connell v. Western Union Tel. Co.* was an action for breach of contract to deliver a death message.[12] The decision here was squarely opposed to the Texas and Tennessee cases.

In the Washington case of *Turner v. Great Northern Ry. Co.* the cause of action was the sale by defendant of a through ticket which was not honored by the connecting carrier.[13]

In the Wisconsin case of *Walsh v. Railway Co.* the action was for breach of contract to furnish a special train to enable plaintiff and others to attend the laying of a cornerstone.[14]

The Federal case and the second Missouri case seem to be contrary to the weight of reason and of authority, since in both the contract dealt primarily with the feelings ,and mental sufferings ought reasonably to have been contemplated as the result of any breach. But the other decisions cited above, as refusing damages for mental suffering, show clearly that the true distinction lies between contracts which deal primarily with the emotions, and those in which the vexation and mental suffering are incidental to the loss of the principal object of the bargain, as understood by both parties. The principal case would seem to fall more properly within the second class, inasmuch as the primary object of

[10] 52 Fed. 264.
[11] 74 Mo. 147.
[12] 116 Mo. 34.
[13] 15 Wash. 213.
[14] 42 Wisc. 23.

the contract was, *prima facie,* the prompt transportation of property. The breach of almost any contract entails a certain amount of vexation, which varies widely according to the plaintiff's temperament, and it would seem contrary to sound policy, as well as unjust to the defendant, to attempt the assessment of this element of damage.